No. 16,224

In the

United States Court of Appeals

For the Ninth Circuit

JAMES FLOOD and MARY EMMA STEBBINS, as Trustees of the Trust created by Paragraph III of the Last Will of James L. Flood, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply Brief

On Appeal from the United States District Court for the Northern District of California

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FREDERICK M. FISK
JOHN P. MACMEEKEN
WALTER C. FOX, JR.
CHICKERING & GREGORY
111 Sutter Street
San Francisco 4, California
Attorneys for Appellants.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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STATUTES

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Introduction

The Brief of the United States illustrates the difficulties that inhere in the judgment below. The Government does not deny that it has taken valuable property of the appellant-trustees. By its own evidence the cost of replacing that property would have been at least $401,000.00. It does not deny that it was under a duty to return the Flood Building in the condition in which it was taken, reasonable wear and tear excepted. However, the Government argues that its taking created no right to just compensation. It contends that when the United States breached its duty, the appellant-

trustees were left without a remedy. The United States thus contends that there can be a taking for which the Fifth Amendment grants no right to just compensation. It argues that the Constitution grants rights for which there is no remedy upon breach. The Brief of the United States demonstrates that there is no precedent in the law of eminent domain for these contentions, which cannot be squared with the Supreme Court's admonition that the constitutional guaranty of the Fifth Amendment may not be "fictionalized" by substituting semantic niceties (for example, unenforceable rights) for "just compensation." *United States v. General Motors Corp.,* 323 U.S. 373, 381-382 (1945).

The United States in defense of its position makes three arguments. *First,* the Government urges that the law of lease contracts does not by analogy entitle a condemnee to complain of the Government's failure to return premises temporarily taken in the condition in which they were received, since the measure of damages applied in waste actions limits a lessor's recovery to the diminution in the market value of his property. What the measure of damages for waste or any other tort action has to do with the law of lease contracts, and more particularly the Government's liability for just compensation, is not suggested. Moreover, the Government fails to point out that even the law of waste through inclusive equitable relief protects a lessor from depredations of the sort perpetrated by the United States. *Secondly,* the United States argues that since just compensation is measured by the value inherent in the property taken, if the market value of the Flood Building was as great upon its return as it would have been had the building been in the condition received, there can be no liability for just compensation. No reason or authority is cited for regarding the Flood Building (or some fractional part thereof) as the "property taken." The Supreme Court

has made it clear that the "property taken" is not the building, but is the appellants' fixtures and permanent equipment carried off or destroyed by the United States. *Finally,* the Government states that it is not required to pay appellant-trustees "for a use which they had abandoned prior to the taking." This argument is addressed to the destruction of a strawman erected by the Government. As it knows perfectly well, no claim to compensation for a "use" is being made in the cases at bar.

Perhaps the most striking feature of the Government's Brief is its refusal to consider the practical consequences of the rule for which it contends. This rule that would allow the Government to confiscate the citizen's property and, without any liability, deny him an unquestioned right, the Government treats as the regrettable but inevitable result of cases in no way concerned with the question before the Court. The Government does not examine the operation of that rule since it cannot defend it.

Argument

I.

THE LAW OF LANDLORD AND TENANT DOES NOT PROVIDE ANY PRECEDENT FOR THE GOVERNMENT'S POSITION THAT IT COULD WITHOUT LIABILITY DISREGARD ITS OBLIGATION TO RESTORE NOR DOES IT SANCTION A DEPARTURE FROM THE EMINENT DOMAIN CASES WHICH HOLD THE GOVERNMENT'S LIABILITY FOR JUST COMPENSATION TO BE MEASURED BY ITS OBLIGATION.

The United States opens its argument with the admonition that, "While the contractual relationship of a landlord and tenant may be consulted in some of its aspects in determining the compensation owing for a temporary taking, the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law" (*Br.,* p. 10). From this premise the

Government turns directly to landlord-tenant decisions, without first considering any of the "settled principles of eminent domain law." In devoting more than half of its argument to landlord-tenant law, the Government does not discuss any of the landlord-tenant decisions cited in the Brief for Appellants (pp. 22-24). It does not discuss the principles which dictated the measure of damages employed in those cases. It does not suggest any respect in which the landlord-tenant decisions cited in the Brief for Appellants "impinge upon settled principles of eminent domain law." Thus, while the United States has entitled its argument "Appellants are not entitled to restoration costs by analogy to law governing lease contracts" (*Br.*, p. 10), what the Government, in fact, argues is that the law of landlord and tenant by analogy allows the United States to take property from Appellants without the payment of any compensation.

The United States argues that a tenant, in the absence of express covenant, impliedly covenants only against waste and where a tenant in breach of such implied covenant surrenders without restoration premises altered by him, the lessor may recover only the diminution in market value of the premises (*Br.*, pp. 13-14). On its assumption that such is the law, the Government implies that a condemnee is not damaged if his rights are similarly circumscribed.

There are, of course, two answers to the foregoing argument. It is irrelevant because, as the United States has put it, "the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law." It is untrue because the Government errs as to the law of landlord and tenant, which does not support the Government's position. Let us consider each of these infirmities in the Government's landlord-tenant argument.

The "settled principles of eminent domain law" which must limit any resort to landlord and tenant decisions have been discussed in the prior Brief for Appellants. Briefly they may be summarized as follows: (1.) A property owner's right in his fixtures and permanent equipment is *property* within the Fifth Amendment (*United States v. General Motors Corp.,* 323 U.S. 373, 383-384 (1945)); (2.) The destruction, damage or depreciation in value of such property by the United States constitutes a constitutional *taking* separate and distinct from a taking of use and occupancy (*United States v. General Motors Corp.,* supra; *Kimball Laundry Co. v. United States,* 338 U.S. 1, 7 (1949)); (3.) While the United States in taking temporary use and occupancy of a building is granted the *right* to make alterations which would constitute enjoinable waste if undertaken by a tenant, in doing so the United States assumes the obligation to restore the premises to the condition in which they were received, reasonable wear and tear excepted (*United States v. 14.4756 Acres of Land,* 71 F. Supp. 1005 (D. Del. 1947); *United States v. 16.747 Acres of Land,* 50 F. Supp. 389 (D. Del. 1943); *In re Condemnation of Lands,* 250 Fed. 314 (D. Ark. 1918)); and (4.) When the United States fails to restore premises altered by it and thereby deprives the condemnee of his fixtures and permanent equipment, the just compensation payable by the United States for its taking is measured by the obligation which it breached. *Kimball Laundry Co. v. United States,* 339 U.S. 1, 7 (1949); *United States v. One Parcel of Land,* 131 F. Supp. 443, 446 (D. D.C. 1955); *United States v. 37.15 Acres of Land,* 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. Certain Parcels of Land,* 55 F. Supp. 257, 264 (D. Md. 1944).

It is elementary in the law that compensation is given in lieu of and as redress for some infringed right. As the eminent domain cases cited by the United States point out,

it is given as "an equivalent" to the property taken (*Br.*, p. 21). If the duty breached by the United States had been merely a duty to return to appellants something as valuable as the property taken for temporary use, the measure of compensation adopted below might be deemed "an equivalent." However, the decided use and occupancy cases have uniformly held that such is not the duty assumed by the United States. The duty of the United States is to return the property taken for temporary use in the condition received, reasonable wear and tear excepted (R. 84). *See: United States v. 37.15 Acres of Land,* 77 F. Supp. 798, 802 (N.D. Cal. 1948). Obviously, the duties are not the same. They impose different obligations. *See e.g. Appleton v. Marx,* 191 N. Y. 81, 83 N. E. 563 (1908); *Willoughby v. Atkinson Furnishing Co.,* 93 Me. 185, 44 Atl. 612 (1899); *Shafer Bros. Land Co. v. Universal Pictures Corp.,* 188 Wash. 33, 61 P.2d 593 (1936). What the Government really argues on the basis of what it claims to be the law of landlord and tenant is that the Court may ignore the distinction in the foregoing duties and by indirection reconstitute the duty to return premises in the condition received as a duty not to diminish the market value of premises taken for use. This, however, flies squarely into the Government's admission that "the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law."

Were the Government's landlord and tenant argument not foreclosed by "settled principles of eminent domain law," it would nevertheless be wholly untenable. The law of landlord and tenant does not allow a tenant to force upon his landlord premises radically altered without the latter's consent, depriving the landlord of any remedy for the tenant's depredations. The United States is wrong when it states that a tenant impliedly covenants only against waste

(*Br.*, p. 13). Indeed, the cases that it cites show that such is not the law. *See e.g. Riverview Properties, Inc. v. United States,* 102 F. Supp. 934 (1952). Absent some disclaimer, a lessee impliedly covenants *to return* the premises at the conclusion of his term in the condition in which they were received, reasonable wear and tear excepted. *United States v. Jordan,* 186 F.2d 803, 806 (6th Cir. 1951); *Patton v. United States,* 139 F. Supp. 279, 283 (W.D. Pa. 1955); *Salina Coca-Cola Bottling Corp. v. Rogers,* 171 Kan. 688, 237 P.2d 218 (1951); *Lane v. Spurgeon,* 100 Cal. App. 2d 460, 223 P.2d 889 (1950). *See:* 51 C. J. S. 1156-1157 (1947). Such an obligation is not the same as waste or an implied covenant against waste.[1] *See: Goodyear Fabric Corp. v. Hirss,* 169 F.2d 115 (1st Cir. 1948). *Cf. Griffin Grocery Co. v. McBride,* 217 Ark. 949, 235 S.W. 2d 38 (1950); *Ryan v. Boston Housing Authority,* 322 Mass. 299, 77 N.E. 2d 399 (1948). The cases cited by the Government show that a liability for waste is not the same as a liability for breach of an implied covenant, the former being *ex delicto* and the latter *ex contractu. See e.g. Winans v. Valentine,* 152 Ore. 462, 54 P.2d 106 (1936). The Government asserts that the measure of damages for waste is the diminution in market value caused by the injury. However, the law of waste does not permit a tenant to alter or strip premises

1. Waste is defined to be "a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disinherison of him that hath the remainder or reversion." 2 *Bl. Com.* 281. It is waste to alter buildings or vary in any manner permanent erections. 6 Wait, *Act. & Def.* 239. Taylor, *Landlord & Tenant,* § 348; Woods, *Landlord and Tenant,* § 420. It is of the nature of waste that it shall have been committed without legal right and that there shall be a privity of estate between the wrongdoer and the reversioner. *Southern Pacific Land Co. v. Kiggins,* 110 Cal. App. 56, 293 Pac. 708 (1930). Since the United States is granted the legal right to alter premises temporarily taken by it, subject to its duty to restore them to the condition in which they were received, its alteration of the Flood Building could not constitute waste. *See: United States v. 14.4756 Acres of Land,* 71 F. Supp. 1005 (D. Del. 1947).

as he sees fit so long as the market value of the premises is not decreased. A tenant cannot without his landlord's consent make alterations to a building. Such alterations constitute waste and may be enjoined even if they would increase the value of his property. *See e.g. F. W. Woolworth Co. v. Nelson,* 204 Ala. 172, 85 So. 449 (1920). *See:* 4 Thompson, *Real Property,* 129-131 (1940 ed.); *Note,* 9 A.L.R. 445 (1920). Thus, even the law of waste precludes a tenant from forcing unwanted alterations on his landlord despite their value.

That the Government's position divorces "just compensation" from the "taking" for which it is given is well illustrated by the quotation at page 14 of its Brief from 3 Sedgwick, *Damages* (9th ed., 1920), pp. 1918-1920, sec. 932. The Government quotes from Sedgwick as though it were quoting some rule relevant to the law of landlord and tenant. In fact, the rule quoted is that applicable in *trespass* actions brought for *injuries to land!* At the same time the United States fails to quote the measure of damages for breach of a tenant's covenant, stated in that work:

> "But where the tenant *at the end of the term* leaves the premises out of repair, the measure of damages is the cost of putting them into repair, and not the depreciation in value of the property. Consequently the measure of damages is not changed by the fact that the premises are as valuable without the repairs as with them, nor that the lessor has contracted with a third party to have the buildings removed at the end of the term." 3 Sedgwick, *Damages* 2083 (9th ed. 1920).

This rule which measures a tenant's liability by his obligation is not only supported by the great weight of landlord-tenant authority but comports to settled eminent domain principle by measuring the compensation payable by the right for which it is granted. It avoids the absurdity

of allowing an obligor to challenge one's right to the performance which he has contracted to furnish. *See e.g. Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612 (1899). A general contractor who had contracted and been paid to restore the Flood Building to the condition in which it was on February 1, 1951, could not justify a wilful breach of his engagement on the grounds that appellants were not damaged by his default. *Cf. All-American Oil & Gas Co. v. Connellee*, 3 F.2d 107 (5th Cir. 1924); *Richmond Wharf & Dock Co. v. Blake*, 39 Cal. App. 1, 177 Pac. 508 (1919); *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, 150 Pac. 405 (1915). The United States, in assuming the same duty, should be in no different position. The cases which the Government cites do not collectively abolish the distinction between a duty not to trespass and a duty to restore. Nor do those cases abolish the distinction between damages recoverable for trespass and those recoverable for breach of a covenant to restore. Indeed the cases cited by the Government do not represent a consistent body of unified precedent. The cases are drawn from a wide variety of fields and embody a diversity of rules. While the Government declares that they are "to the same effect" (*Br.*, p. 19), even a cursory reading of those cases disabuses any such idea. No purpose could possibly be served by discussing them individually. Suffice it to say those cases do not support the Government's position.[2] Thus, in *Realty Associates, Inc. v. United States*, 138

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2. *Murray v. Patterson*, 18 Tenn. App. 30, 72 S.W. 2d 559 (1934), *Hickman v. Wellauer*, 169 Wis. 18, 171 N.W. 635 (1919), *Zindell v. Central Mutual Ins. Co.*, 222 Wis. 575, 269 N.W. 327 (1936), and *Ereeg v. Fairbanks Exploration Co.*, 95 F.2d 850 (9th Cir. 1938), cited at page 19 of the Government's Brief, are all tort cases, in which damages were measured by the duty from which liability arose. *Eastern Steamship Lines, Inc. v. United States*, 112 F. Supp. 167 (Ct. Cl. 1953), *Gardner v. Darling Stores Corp.*, 242 F.2d 3 (2nd Cir. 1957), and *Georgia Kaolin Co. v. United States*,

F. Supp. 875, 876 (Ct. Cl. 1956), and *Crystal Concrete Corp. v. Town of Braintree,* 309 Mass. 463, 35 N.E. 2d 672, 675 (1945), it is made clear that the rule is not what the Government states it to be. In the words of the former decision, "Generally speaking the cost of restoring is the measure of damages, taking into consideration the age of the installations and ordinary wear and tear." In both cases exceptions are made to that rule only on the basis of *unique* circumstances which the Government does not suggest to be present here. In apparent recognition that damages in an amount less than the cost of restoration is an *inadequate* remedy, both explicitly announce that they are not passing upon the lessor's rights in equity.[3]

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214 F.2d 284 (5th Cir. 1954), cited at pages 16 and 19, turned on specific contract provisions defining liability. *Fuselier v. United States,* 111 F. Supp. 471 (W.D. La. 1953), and *Carr v. United States,* 28 F. Supp. 236 (W.D. Ky. 1934), cited at pages 17 and 20, respectively, turn on the construction of statutes. *Henry H. Cross Co. v. Rice,* 45 F.2d 940 (7th Cir. 1931), cited on page 19, measures the *depreciation* of equipment by its diminution in value. Neither *Zoslow v. National Savings & Trust Co.,* 201 F.2d 208 (App. D.C. 1952), nor *In re Jewell,* 13 Fed. Cas. No. 7302 (S.D. N.Y. 1879), consider the measure of damages. In none of the cases which the Government cites was a lessee permitted without liability to appropriate and destroy valuable fixtures and equipment of the lessor's. None conceivably sanctions depredations of the sort practiced by the United States.

3. Thus, the Court of Claims in the *Realty Associates* case states explicitly (138 F. Supp. at 877):

> "If this were a suit for specific performance, the plaintiff might well compel the defendant to actually restore the property to the status and condition which prevailed in May 1943, upon the performance of which the property would again become practically useless. I am sure the plaintiff would not have thought of instituting such a suit because it is inconceivable that it would have wanted the property restored to its previous condition which had produced years of idleness. In the light of the entire record it is difficult to believe that plaintiff in good faith wanted any of the items restored."

Cf. Crystal Concrete Corp. v. Town of Braintree, 309 Mass. 463, 35 N.E. 2d 672, 675 (1945).

Apart from the complete inconsistency of the Government's position with "settled principles of eminent domain law," it is evident that a condemnee cannot pick and choose between equity and law for relief. A condemnee when his property is taken can only claim just compensation (a fact which the United States made clear when the appellant-trustees late in these cases expressed their willingness to accept specific performance). Accordingly, a landlord-tenant case which compels a lessor to enforce his rights in equity and curtails his rights at law cannot be even analogical authority for limiting a condemnee's right to just compensation. However, even in the realm of landlord and tenant the United States cites no case in which a tenant has been able to confiscate his landlord's fixtures and equipment without liability. It cites no case parallel to the case at bar. The "federal rule" that it suggests (*Br.*, p. 20) is contradicted by cases it cites. *See e.g. Realty Associates, Inc. v. United States,* 138 F. Supp. 875, 876 (Ct. Cl. 1956). It equally errs in stating the law of California. *See: Sprague v. Fauver,* 71 Cal. App. 2d 333, 162 P.2d 865 (1945); *Coughlin v. Blair,* 41 Cal. 2d 587, 600, 262 P.2d 305 (1953). *Cf. Green v. General Petroleum Corp.,* 205 Cal. 328, 270 Pac. 952 (1928). In short, the Government's argument fails both because it is unable to find authority in the law of landlord and tenant for its position and because, as it has conceded, "the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law."

II.

THE LAW OF EMINENT DOMAIN PROVIDES NO BASIS FOR THE GOVERNMENT'S POSITION THAT IT COULD APPROPRIATE AND DESTROY WITHOUT LIABILITY THE PROPERTY OF THE APPELLANT-TRUSTEES.

In turning finally to a consideration of eminent domain principles, the United States in its Brief makes three argu-

ments. The first contention made is that just compensation is measured by the "value inherent in the property" taken, and hence, if the market value of the Flood Building on its return was as great as it would have been had the property removed from the building been restored, no compensation is payable (*Br.*, p. 21-23). In making this argument the United States has assumed without discussion or the citation of authority that the property taken was some fractional part of the Flood Building. As pointed out in the Brief for Appellants, the Government's assumption is inadmissible. Thus, in *United States v. General Motors Corp.*, 323 U.S. 373, 383-384 (1945), the Supreme Court held that:

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's right in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. * * * And since they are property distinct from the right of occupancy such compensation should be awarded not as a part of but in addition to the value of occupancy as such."

Thus, when the United States appropriates equipment and fixtures in the course of a temporary taking, its liability for just compensation in the absence of restoration is in no sense contingent upon the market value of the premises occupied upon their return. If the Government's liability could be discharged, as it argues, by the return of a radically altered Flood Building with a market value equal to that which it was obligated to return, it could just as logically have been discharged by the delivery of a building of equal value in Muncie, Indiana, or a factory of equal value in Trenton, New Jersey. The Government's argument that

"The question is whether, in the entire transaction, the landowners have been pecuniarily damaged" (*Br.*, p. 28) could be equally well invoked had such a course been pursued.

The use and occupancy cases cited by the Government do not in any way support its position (*Br.*, p. 24). *See: United States v. Jordan,* 186 F.2d 803 (6th Cir. 1951); *United States v. 37.15 Acres of Land,* 77 F. Supp. 798 (N.D. Cal. 1948); *United States v. 60,000 Square Feet of Land,* 53 F. Supp. 767 (N.D. Cal. 1943); *United States v. 5,901.77 Acres of Land,* 65 F. Supp. 454 (N.D. Cal. 1946).[4] Indeed, we invite and urge this Court to read those cases and observe the rule that they enunciate as to the liability of the United States upon breach of its unquestioned duty to return premises temporarily taken in the condition received, reasonable wear and tear excepted. It is obviously beyond the realm of argument whether *United States v. 37.15 Acres of Land,* 77 F. Supp. 798 (N.D. Cal. 1948), for example, supports appellants' or appellee's position. The fact follows the clear and unambiguous language of the Court:

> "It is not, and clearly could not be, disputed that the United States was obligated to return the hotel together with its equipment and furnishings, to the owner

4. *United States v. Jordan,* 186 F.2d 803 (6th Cir. 1951), involved a temporary taking of land for use as a gunnery range, in which timber was left with bullets lodged in it and was rendered useless. While standing timber is obviously not the same as a building's fixtures and equipment, it was held that, "Such damage to or destruction of the standing timber imposed an obligation upon the Government under the Fifth Amendment to the Constitution of the United States to make payment to the lessor *for the value thereof,* in addition to its obligation for the rental value of the property so leased. *United States v. General Motors Corp.*, 323 U.S. 373, 383-384, 65 S.Ct. 357, 89 L.Ed. 311; *Kimball Laundry Co. v. United States,* 338 U.S. 1, 7, 69 S.Ct. 1434, 93 L.Ed. 1765." (Emphasis ours.) There is no suggestion that the right to compensation is limited to or contingent upon diminution in the market value of the fee. The remaining cases cited by the Government as supporting its position have been discussed in the note at pages 29 and 30 of the Brief for Appellants.

> upon the termination of the term, in as good a condition as when received, reasonable wear and tear thereof excepted. * * * However, the government elected not to restore the premises, repair the damage caused to real and personal property lost or destroyed, but left that to be done by the owners. Therefore it would follow that the United States is liable for the reasonable cost of restoring the premises and personal property and also for the reasonable value of the use of the premises during the period of time required to accomplish such restoration." 77 F. Supp. at 802-803.

The Government argues that the decided use and occupancy cases do not mean what they say in referring to "restoration" and the "cost of restoration" (*Br.*, pp. 24-27). It asks this Court to read restrictions, conditions and limitations into the cases cited in the Brief for Appellants which were not expressed by the courts which decided those cases. Whether those courts meant what they said is not a matter which can be argued. We urge this Court to read those decisions and submit that while the Government may deny that they mean what they say, it can show no rational basis for its contention.

The second argument made by the United States in the context of eminent domain is that to measure the Government's liability for just compensation by what it was obligated to do, but refused to do, reimburses the appellant-trustees "for the particular values which they attach to the building" and involves a departure from a standard of "external validity" (*Br.*, p. 12). For this contention neither authority nor reason is advanced. Obviously, the courts invoking the measure have not found any such infirmity, but to the contrary have deemed it "the very amount that the government would have been required to pay in any event" had it discharged its duty and avoided the taking. *See e.g. United States v. 37.15 Acres of Land,* 77 F. Supp. 798, 803

(N.D. Cal. 1948). Certainly the concepts of "reasonable cost" and "market rental value" are no less objective than "market value."

The third and final eminent domain argument which the United States makes is that it cannot be required to pay for a *use* abandoned prior to taking (*Br.*, pp. 28-29). No one is claiming that it should pay for *use*. A condemnee being denied any right to consequential damages, it is wholly irrelevant what use or uses were made of premises prior to a temporary taking. However, this elementary principle only points up and emphasizes the untenability of the Government's argument that there is no pecuniary deprivation when the Government, although breaching its duty, returns a building having a market value equal to that taken for use. The United States takes temporary use of an electronics plant which it returns as a missile plant of equal market value. The owner of the electronics plant cannot secure consequential damages occasioned by the return of a plant which he is not equipped to operate. If he desires to sell the missile plant to obtain the dollars necessary to buy an electronics plant of the type which the Government took and was obligated to return, the Government does not pay for profits lost by an idle plant, the cost of holding the plant until a buyer can be found, or, indeed, the cost of securing that buyer. Indeed, by the time the case is decided the market value determined may be only a fact of historical interest. Thus, the point that the Government makes as to consequential damages shows that the measure of just compensation for which it contends, aside from precedent, is wholly unreasonable. In permitting the United States to profit from default, the rule exposes the landowner not only to denial of his right but to extensive financial losses which being consequential in nature would give rise to no right to compensation.

III.

THE GOVERNMENT IN ITS BRIEF HAS NOT CONSIDERED THE PRACTICAL CONSEQUENCES OF THE RULE FOR WHICH IT CONTENDS BECAUSE IT CANNOT DEFEND THE OPERATION OF SUCH A RULE.

Although the case at bar involves basic and far-reaching questions as to a citizen's constitutional rights when his property is taken by the United States for temporary use, the United States in its Brief does not discuss anywhere the consequences of the rule urged by it and adopted below. Unquestionably this failure results from the belief that the rule when treated as other than a logical deduction, cannot be defended. We submit that the idea that the Government can appropriate and destroy hundreds of thousands of dollars' worth of property, and then breach without liability its unquestioned duty to replace and restore that property, is not an attractive idea.

In our society a landowner enjoys the right to use his property in any lawful way that he sees fit. The rights attaching to property are not repealed when a landowner's use of his property is not what Government witnesses deem the highest and best use. The fact that many buildings in this area are being converted to parking lots does not mean that a landowner's rights in buildings which could profitably be so converted are no longer protected. When the Government took temporary use and occupancy of the Flood Building it purported to take no more and paid for no more. Its respective Complaints claimed no right of spoliation, no right to strip the building of everything not decreasing its market value. It paid for the use of the premises a compensation fixed on the basis of the reasonable rental value of the property, a sum fixed with reference to a hypothetical lessee who could be enjoined from committing waste and who impliedly would covenant to return the premises in

the condition received, reasonable wear and tear excepted. Common sense dictates that such rent is quite different than that which would prevail were the tenant able to strip the demised premises at his pleasure without liability. However, the Government does not claim any right to strip premises temporarily taken. To the contrary, it admits that it was under a duty to return the premises in the condition in which they were received, reasonable wear and tear excepted, but it claims that it can limit liability to the diminution in market value of the premises used, and hence, so long as a jury will believe its chosen experts that the fee has not diminished in market value, its duty may be ignored without liability.

The rule urged by the Government leaves those deprived of their right helpless to secure its enforcement, but look to its consequence on the Government. As pointed out in our prior brief, the rule urged rewards the Government for its default. It makes default considerably more profitable than obedience to the Government's unquestioned duty. Not only does it save the cost of restoration but it permits the Government to help itself to hundreds of thousands of dollars' worth of valuable property for nothing. This the Government has not and cannot deny. We submit that such a rule would fly into the face of common sense. Happily, however, examination of the relevant authorities makes it abundantly clear that such is not the law.

Conclusion

The appellant-trustees having been denied the just compensation guaranteed under the Fifth Amendment, the judgment of the District Court must be reversed, with direction that they recover the reasonable cost of restoring the premises to the condition in which they were taken on February 1, 1951, and the reasonable rental value of the premises for the period reasonably required to effect that restoration.

Respectfully submitted,

FREDERICK M. FISK
JOHN P. MACMEEKEN
WALTER C. FOX, JR.
CHICKERING & GREGORY
Attorneys for Appellants.